

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

APOLLO, INC, a Washington
corporation; and APOLLO SHEET
METAL, INC., a Washington
corporation,

Plaintiffs,

v.

PARSONS INFRASTRUCTURE &
TECHNOLOGY GROUP, INC, a
Nevada corporation,

Defendant.

NO. CV-03-5095-RHW

**ORDER DENYING, IN PART,
AND GRANTING, IN PART,
DEFENDANT'S MOTIONS FOR
SUMMARY JUDGMENT**

Before the Court are Defendant's Motion for Summary Judgment Regarding Damages and Causation (Ct. Rec. 136); Defendant's Motion for Summary Judgment Regarding Breach of Contract (Ct. Rec. 138); Defendant's Motion for Summary Judgment Regarding Tortious Interference with Business Expectancies (Ct. Rec. 140); Defendant's Motion for Summary Judgment Regarding Fraud (Ct. Rec. 142); and Defendant's Motion for Summary Judgment Regarding Misappropriation of Trade Secrets (Ct. Rec. 144). A hearing was held on the motions on June 3, 2005, in Spokane, Washington. Plaintiffs were represented by John Stewart and Thomas Larkin; the Government was represented by Robert Olson and David Schiffren.

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**ORDER DENYING, IN PART, AND GRANTING, IN PART,
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BACKGROUND

Fluor Hanford is a government contractor hired by the United States Department of Energy, which is in charge of the cleanup and ultimate closure of the Hanford Nuclear Reservation located in Richland, Washington. On May 22, 2003, Fluor and its subcontractor, CH2M Hill Hanford, issued a Request for Proposals (“RFP”) regarding fabrication services. On June 4, 2003, representatives from Plaintiffs and Defendant attended a pre-proposal conference held in Richland, Washington.

The RFP gave favorable treatment to proposals submitted with small business participation. Defendant was a large corporation, with corporate offices in Pasadena, California, and Plaintiffs were a small local business. After holding discussions with four local small businesses, Defendant decided to work with Plaintiffs to submit a joint proposal.

Bruce Ratchford, of Apollo, and Jim Osterloh and Steve Gorin, of Parsons, met on June 10, 2003. According to Plaintiffs, Defendant informed them that Defendant was interested in submitting a joint proposal with Plaintiffs because of Plaintiffs’ prior experience with fabrication contracts at the Hanford facility, Plaintiffs’ general experience with fabrication, and because Plaintiffs were a small business. Plaintiffs assert that they specifically informed Defendant of the details of their safety record at the June 10, 2003 meeting. Mr. Gorin prepared the Draft Teaming Agreement for Plaintiffs’ review after the June 10, 2003 meeting. On June 16, 2003, Mr. Ratchford and Mr. Osterloh met to discuss the Draft Teaming Agreement. At some point, Mr. Ratchford, in the presence of Plaintiffs’ employees Brett Estey, Dan Briscoe, and Mr. Osterloh, stated that Mr. Estey and Mr. Briscoe should go forward in preparing the joint proposal because “we have an agreement.” Later that day, a kick-off meeting was held in which personnel from both companies discussed proposal preparation responsibilities. In an Interoffice Correspondence written by Mike Pell, of Parsons, to Karl Burchett on June 17,

1 2003, Mr. Pell writes that “an exclusive agreement has been made between Parsons
2 and the Apollo Group.”

3 Personnel from both companies continued to meet on June 18, 20, 25, 26,
4 29, and 30, 2003. During these meetings, the parties discussed specifics of
5 proposal preparation, including Plaintiffs’ proposal strategy, pricing, cost structure,
6 proposed work processes, Plaintiffs’ safety program, Plaintiffs’ quality assurance
7 program, specific examples of forms, lists of vendors and clients, descriptions of
8 Plaintiffs’ internal accounting and estimating systems, and internal capabilities and
9 weaknesses strategy reports. Plaintiffs also provide information regarding the
10 sample task portion of the RFP.

11 On July 1, 2003, Defendant notified Plaintiffs that it had decided not to team
12 with Plaintiffs on the Hanford Fabrication Services procurement. Defendant
13 asserts that in reviewing Plaintiffs’ copy of its Safety Manual for inclusion into the
14 proposal, which it had received on July 27, 2003, it realized that Plaintiffs’ safety
15 record violated the minimum standards set forth in the RFP, and concluded that a
16 joint proposal with Plaintiffs would not be successful. Plaintiffs assert Defendant
17 had been aware of any safety issues since the June 10, 2003 meeting.

18 Prior to the July 1, 2003 notification, representatives from Plaintiffs and
19 Defendant had met to try to work out a solution regarding Plaintiffs’ safety record.
20 Defendant asserts that a possible solution was discussed in which Defendant would
21 become the prime contractor, and Plaintiffs would be the subcontractor. According
22 to Defendant, Plaintiffs rejected this offer. According to Plaintiffs, Mr. Ratchford
23 agreed with Defendant’s suggestion that Defendant would act as prime contractor
24 and Plaintiffs would be a subcontractor. In any event, discussions broke down and
25 the parties proceeded to submit individual proposals to the RFP.

26 Defendant submitted a proposal to the RFP, with Defendant as prime
27 contractor, and American Electric & Northwest Inspection as subcontractors.
28 Plaintiffs also submitted a proposal to the RFP, with Plaintiffs as prime contractor,

1 and Mid Columbia Engineering (“MCE”) and COCEMA Engineering as
2 subcontractors. Ultimately, Defendant was awarded the bid.

3 On August 18, 2003, Plaintiffs filed a complaint in Benton County Superior
4 Court seeking injunctive and declaratory relief, as well as monetary damages. The
5 named Defendants were Parsons Infrastructure & Technology Group, Inc., Fluor
6 Hanford, Inc., and CH2M Hill Group, Inc. The case was removed to the United
7 States District Court for the Eastern District of Washington on September 11,
8 2003. On June 9, 2004, Plaintiffs filed a Second Amended Complaint seeking
9 injunctive and declaratory relief, and damages for breach of contract, fraud,
10 interference with prospective economic advantage, and misappropriation of trade
11 secrets, and also adding the United States as a Defendant (Ct. Rec. 76). On
12 November 11, 2004, the Court granted the United States’ Motion to Dismiss, as
13 well as Defendants Fluor Hanford, Inc. and CH2M Hill Group, Inc.’s Motion for
14 Judgment on the Pleadings (Ct. Rec. 112). Defendant Parsons now moves for
15 summary judgment on all of Plaintiffs’ remaining state claims.

16 JURISDICTION

17 The Court has jurisdiction to hear this case based on diversity of citizenship,
18 pursuant to 28 U.S.C. § 1332.

19 DISCUSSION

20 I. Standard of Review

21 Summary judgment is appropriate if the “pleadings, depositions, answers to
22 interrogatories, and admissions on file, together with the affidavits, if any, show
23 that there is no genuine issue as to any material fact and that the moving party is
24 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). There is no
25 genuine issue for trial unless there is sufficient evidence favoring the nonmoving
26 party for a jury to return a verdict in that party’s favor. *Anderson v. Liberty Lobby,*
27 *Inc.*, 477 U.S. 242, 250 (1986). If the nonmoving party “fails to make a showing
28 sufficient to establish the existence of an element essential to that party’s case, and

on which the party will bear the burden of proof at trial,” then the trial court should grant the motion.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When considering a motion for summary judgment, a court may neither weigh the evidence nor assess credibility; instead, “the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255.

II. Defendant’s Motions

Defendant has filed a number of summary judgment motions regarding Plaintiffs’ remaining state claims.

A. Defendant’s Motion for Summary Judgment Regarding Damages and Causation

Defendant argues that there are no genuine issues of material fact regarding whether Plaintiffs would have received the contract, but for Defendant’s actions. As a result, summary judgment is appropriate for all of Plaintiffs’ claims because Plaintiffs cannot show that Defendant caused their alleged damages.

Plaintiffs argue that, but for Defendant’s conduct, it would have been awarded the contract either: (1) on its own, had preparation of its bid not been interfered with by Defendant; (2) with Plaintiffs as the prime contractor, and Defendant as a subcontractor; (3) with Defendant as the prime contractor, and Plaintiffs as a subcontractor; or (4) with some other team member or members, as either a prime or significant subcontractor.

Plaintiffs’ arguments, for the most part, are without merit. Assuming that the Teaming Agreement is a legally enforceable agreement, the terms of the agreement did not anticipate that Defendant would become the prime contractor with Plaintiffs as a subcontractor. Thus, Plaintiffs do not have a legal basis for assuming that they could have obtained the contract under this arrangement because Defendant was not legally obligated to act as a prime contractor. Additionally, Plaintiffs did not submit any evidence that they would have entered

1 into any other agreement with another company, but for the exclusive nature of the
2 teaming agreement. Plaintiffs assert that they could have, theoretically, teamed
3 with the second place bidder, RHM. Plaintiffs did not provide any evidence that
4 RHM would have been interested in working with Plaintiffs in obtaining the bid.
5 Thus, the Court finds that there are no genuine issues of material facts regarding
6 whether Plaintiffs would have received the bid, but for Defendant's conduct with
7 Plaintiffs' third argument that they could have received the bid with Defendant as
8 prime, or with their fourth argument that they could have teamed with RHM, or
9 any other company.

10 Plaintiffs argue that they could have received the bid on their own if they
11 had more time to prepare and if Defendant had not submitted a bid. In order to
12 succeed in this argument, Plaintiffs must show that they would have been selected
13 over the second-place bidder. In reviewing the evidence provided by the parties,
14 the Court concludes that a trier of fact could reach only one conclusion, namely,
15 that Plaintiffs would not receive the bid as prime, without Defendant as the
16 subcontractor. *See City Solutions, Inc. v. Clear Channel Communications, Inc.*,
17 365 F.3d 835, 841 (9th Cir. 2004) (holding that a question of fact may be
18 determined as a matter of law when reasonable minds can reach only one
19 conclusion); *Miller v. Likins*, 109 Wash. App. 140, 144 (2001).

20 A review of the Source Evaluation Board Award Recommendation Report
21 for Request for Proposal (RFP) 050103-DLS shows that RHM had the same or
22 superior rating as Plaintiffs in all categories. (Ct. Rec. 152, at p. 81.) Importantly,
23 RHM received a yellow rating in the Safety Program category and Plaintiffs

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received an amber rating.¹ (Ct. Rec. 152, at pp. 80, 81.) In a September 11, 2003 letter to Plaintiffs from the TET, the TET identified potential safety issues that were apparent from the site visit. (Ct. Rec. 153, at p. 55.) The letter says nothing about the prior safety record. Indeed, the Award Recommendation Report, which set forth TET's rating for each contractor competing for the bid, stated that "the safety statistics provided by Apollo meet the RFP criteria, despite an overall safety record that is less than optimal." (Ct. Rec. 152, at p. 73.) The report went on to say that "Apollo has been effective in implementing the corrective actions, leading to a noticeable improvement in its safety statistics for the past two years. The safety plan submitted by Apollo was also deemed acceptable, meeting the criteria and expected quality levels." (Ct. Rec. 152, at p. 74.)

Despite this, and contrary to Plaintiffs' representations, safety remained a concern for TET. During the field visit, members of the TET observed three separate safety violations. (*Id.*) The TET members were concerned about Plaintiffs' immediate verbal response at the time of the occurrence, as well as having three safety violations occur even though Plaintiffs knew the observers were coming. (*Id.*) The TET concluded that Plaintiffs' current level of field execution of their safety plan submitted was less than adequate and posed

¹The following definitions apply to the Color Code referred to in the Technical Evaluation Team (TET) Recommendation Report:

Color Code	Rating	Definition
Green	Good	Fully satisfies criteria and expected standards; strengths outweigh weaknesses.
Yellow	Acceptable	Meets criteria and expected standards; no major strengths or weaknesses and apparent
Amber	Poor	Does not appear to meet criteria and expected standards; major weaknesses are apparent, but could possibly be rectified.

(Ct. Rec. 152 at p. 70.)

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1 substantial risk when managing HAMTC (union) workers. (*Id.*) As a result of
2 their observations, the TET was concerned that Plaintiffs' "sheet metal shop and
3 their subcontractors did not demonstrate that what is submitted in their safety plans
4 is followed in the field," and stated that "there is serious concern with respect to
5 how Apollo and their subcontractors will ensure their safety plan and procedures
6 are executed." (*Id.*) Plaintiffs' amber score, then, was not caused in any way by
7 Defendant's conduct. Instead, the amber score was a result of the condition of
8 Plaintiffs' facility and Plaintiffs' overall approach to safety.

9 Plaintiffs also received an amber rating in Management and Technical
10 Approach. (*Id.* at 72.) Plaintiffs received this lower rating, in part, because of their
11 teaming relationship with MCE. (*Id.*) It appears that Fluor may have a prior
12 experience with MCE that was less than favorable. (*Id.*) The TET concluded that,
13 "[b]ased on the references and the presentation of the engineering organization, [it]
14 felt that this element was below the expected standards for engineering support,
15 and poses risks in this area." (*Id.*) The TET also noted that the integration
16 between Plaintiffs and their teaming partners appeared to be weak. (*Id.*) Plaintiffs
17 teamed with MCE only after Defendant pulled out of the Apollo/Parsons project.
18 Viewing the facts in the light most favorable to Plaintiffs, the lack of integration
19 and coordination could be attributed to Defendant's late-hour decision to pull out
20 of the project. Thus, it could be argued that Plaintiffs could have received a green
21 rating in this category, but for Defendant's conduct. Even if this were the case,
22 however, Plaintiffs still would not have won the bid over RHM. The TET was also
23 concerned about Plaintiffs' key personnel and the ability to successfully manage
24 the project. The TET discussed their concerns with Plaintiffs, but it appears that
25 Plaintiffs were committed to having Mr. Estey run the project. The decision to
26 keep Mr. Estey as project manager was not a result of Defendant's decision to not
27 submit a joint proposal with Plaintiffs. Thus, the argument that Plaintiffs would
28 have received a green rating in Management and Technical Approach is not

1 supported.

2 Regardless of whether Plaintiffs received a green or yellow in the
3 Management and Technical Approach, however, Plaintiffs would not have been
4 awarded the contract because RHM still would have received a higher score.
5 Plaintiffs' score for past performance was not affected by Defendant's conduct and
6 would not change, regardless of the company with which Plaintiff would ultimately
7 team. Likewise, there is no evidence presented that Defendant hampered
8 Plaintiffs' transition score.

9 Below is a comparison of the ratings received by Plaintiffs and RHM, giving
10 Plaintiffs a hypothetical Green rating in Management and Technical Approach.
11 For ease of comparison, the Court awarded points for each rating: green, 3 points;
12 yellow, 2 points, and amber, 1 point.

Evaluation Criteria	Apollo Adj. Rating		RHM Adj. Rating	
Management and Technical Approach	Green	3	Yellow	2
Transition Plan	Yellow	2	Yellow	2
Past Performance	Yellow	2	Green	3
Safety Program	Amber	1	Yellow	2
Business Development Plan	Green	3	Green	3
Overall Rating		11		12

21 Viewing the evidence in the light most favorable to the Plaintiffs, the Court
22 concludes that there is only one reasonable conclusion based on the facts in the
23 record, that is, that Plaintiffs would not have received a bid as prime contractor,
24 without Defendant as subcontractor. According to the reasoning and conclusions
25 of the evaluation committee as set forth in the TET Recommendation Report,
26 Plaintiffs' score in the Safety Program category would have prevented Plaintiffs
27 from receiving a higher score than RHM; therefore, they cannot show that they
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1 would have received the bid as a prime contractor, acting alone.

2 Also, Plaintiffs' argument that they could have submitted a better proposal if
3 they had more time is without merit, since it is clear from the record that Plaintiffs
4 had ample time and opportunity to supplement the record. After receiving the
5 proposals, the TET, which had reviewed the proposals, decided it was necessary
6 for the parties to submit a Best and Final Offer. The TET prepared a list of
7 questions and clarifications needed from each of the parties who submitted
8 Proposals. Meetings were held with the TET, and each party was given an
9 opportunity to submit their clarification response with their best and final offer.
10 Plaintiffs received a letter dated September 15, 2003, outlining the TET's concerns
11 and were allowed until October 10, 2003 to file their Best and Final Offer. (Ct.
12 Rec. 153 at 55.) Thus, Plaintiffs were given a significant amount of time to submit
13 a proposal on their own, so it does not appear that Plaintiffs can complain about the
14 lack of time to adequately compete for the Proposal, because they were given an
15 additional month in which to respond to the TET's concerns.

16 Moreover, the TET was concerned about Plaintiffs' pricing structure, and
17 expressed this concern during the Best and Final Offer period. (Ct. Rec. 153 at
18 83.) Plaintiffs' pricing was almost a third less when comparing the costs of the
19 other bidders. (*Id.*) The TET discussed its concern regarding the pricing structure,
20 and, according to the Evaluation Report, subsequent discussions with Plaintiffs
21 failed to eliminate its concern. (*Id.*) The TET ultimately concluded that "the cost
22 evaluation left apprehension that not all costs [were] included in [Plaintiffs']
23 evaluated price." (*Id.*) The failure to alleviate the TET's concern regarding pricing
24 was not affected by Defendant's actions. (*Id.*)

25 Plaintiffs also argue that they suffered damage because but for Defendant's
26 departure, the Apollo/Parsons joint proposal would have received the contract.
27 In support of their summary judgment motion, Defendant relies on the declaration
28 of Daniel Sutter, Contract Specialist for Fluor Hanford, Inc., who was part of the

1 evaluation team, who concluded that Plaintiffs would not have been successful in
2 obtaining an award, even if Defendant continued in the project as a subcontractor.
3 (Ct. Rec. 150 at p. 19.) Plaintiffs have established that there are genuine issues of
4 material fact regarding the credibility of Mr. Suter, although the Court
5 acknowledges that the evidence is weak. Unless the Court can conclude that
6 reasonable minds can come to only one conclusion based on the facts, summary
7 judgment is not appropriate with regard to causation. *City Solutions, Inc.*, 365 F.3d
8 at 841; *Miller*, 109 Wash. App. at 144. Given the fact that Mr. Suter is an
9 employee of Fluor, which was, at one time, a named party in this lawsuit, the Court
10 cannot find that there is no scenario in which the trier of fact could have reasonably
11 concluded that a joint Apollo/Parson proposal would not have won the bid.
12 Moreover, Defendant's experts have acknowledged that if Plaintiffs are successful
13 in their claim, the amount of damages can be proven with "reasonable certainty."
14 *See Eagle Group, Inc. v. Pullen*, 114 Wash. App. 409, 418 (2002) (holding that a
15 plaintiff may recover lost profits if the evidence establishes the damages with
16 reasonable certainty).

17 Viewing the facts in the light most favorable to Plaintiffs, the only genuine
18 issue of fact that remains with regard to causation and damages is whether
19 Plaintiffs were damaged by the Defendant's failure to submit a joint proposal with
20 Plaintiffs as prime contractor, and Defendant as a subcontractor. Plaintiffs have
21 failed to establish a genuine issue of material fact regarding their claims that they
22 were damaged because Defendant submitted a proposal on its own and won,
23 because Defendant did not submit a joint proposal as prime contractor with
24 Plaintiffs as subcontractor, or because they could have submitted a successful
25 proposal with another company. Thus, summary judgment regarding these
26 causation issues is appropriate. The only remaining causation issue for trial, then,
27 is whether Plaintiff was damaged by Defendant's failure to submit a joint proposal
28 with Plaintiff.

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1 In so ruling, the Court is mindful of the Ninth Circuit case of *City Solutions,*
2 *Inc. v. Clear Channel Communications, Inc.*, 365 F.3d 835 (9th Cir. 2004), in which
3 the circuit recognized that under California law, facts relating to the issue of
4 causation is a job properly left to the trier of fact and should not be the basis for
5 the granting of a summary judgment motion. *Id.* at 840. The facts in *City*
6 *Solutions* are strikingly similar to this case. In *City Solutions*, the plaintiff alleged
7 there was an oral teaming agreement and defendant pulled out of a joint bid
8 proposal at a late hour. *Id.* at 837. The district court relied on the plaintiff's
9 testimony that it was not hurt by having to bid with the two companies that
10 replaced the defendant in holding that there was no scenario by which a jury could
11 reasonably conclude that the plaintiff could have won the bid, either alone or in
12 combination with anyone other than defendant. *Id.* at 841. The circuit held that
13 the district court erred in granting judgment as a matter of law by failing to account
14 for the possibility that a jury could have found that the plaintiff was hurt by the
15 defendant's improved proposal attributable to its misuse of the plaintiff's
16 confidential bidding strategies. *Id.*

17 The *City Solutions* case is distinguishable from this case because, as
18 discussed above, Plaintiffs cannot argue that they were hurt by Defendant's
19 improved position as a result of its use of Plaintiffs' confidential information
20 because Plaintiffs cannot show that they would have received the bid if Defendant
21 had not bid. Likewise, there is no evidence in the record that it was possible for
22 Plaintiffs to improve their position by teaming with some other company, or that
23 Defendant was legally obligated to submit a joint proposal with Defendant as
24 prime contractor and Plaintiff as subcontractor. In contrast to *City Solutions, Inc.*,
25 then, there is no scenario by which a jury could have reasonably concluded that
26 Plaintiffs would have received the bid if Defendant had not bid as prime contractor.

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B. Defendant's Motion for Summary Judgment Regarding Breach of Contract

Defendant argues that there are no genuine issues of material fact regarding whether there was a legal enforceable contract between Plaintiffs and Defendant.

Washington law recognizes a distinction between an "agreement" and a "contract." An agreement is "a manifestation of mutual assent by two or more persons to one another." *Corbit v. J.I. Case Co.*, 70 Wash. 2d 522, 531 (1967). A contract is "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." *Id.* Consequently, there are no legal consequences that attach to an agreement. *Id.*

Washington law also follows the objective theory of contracts, which focuses on the outward manifestation of assent made to the other party. *Lynott v. National Union Fire Ins. Co. of Pittsburgh*, 123 Wash. 2d 678, 682 (1994). Thus, in determining a party's intention to contract, such party will be held to what a reasonable person in the position of the other party would conclude his or her manifestation to mean. *Id.* When interpreting a contract, then, the subjective intention of the parties is irrelevant; instead, emphasis is placed on the outward manifestations of assent made by each party to the other. *Id.* In order to prove their breach of contract claim, Plaintiffs must show that the contract imposed a duty, Defendant breached that duty, and the breach proximately caused damage to Plaintiff. *Northwest Indep. Forest Mfrs. v. Department of Labor & Indus.*, 78 Wash. App. 707, 712 (1995).

It is undisputed that the parties discussed entering into a joint venture in order to bid on the RPF. It is also undisputed that the parties engaged in preliminary negotiations over the specific terms of their future business relationship, to take effect if their joint proposal was selected by Fluor. The parties began working together on the proposal in response to the RFP after their second meeting, and they were working on finalizing a written contract to cover their

1 future business relationship.

2 The Court finds that there are genuine issues of material fact as to whether
3 the parties entered into an enforceable contract to submit a bid with Apollo as
4 prime, and whether Defendant breached the contract.

5 **C. Defendant's Motion for Summary Judgment Regarding Tortious**
6 **Interference with Business Expectancies**

7 Defendant argues that there are no genuine issues of material fact regarding
8 whether Defendant tortiously interfered with Plaintiffs' business expectancies. In
9 asserting this claim, Plaintiffs argue that they had a reasonable expectancy of
10 obtaining an award of the contract, that they were in a strong position to be
11 awarded the contract and, but for Defendant's actions, they would have received
12 the contract.

13 Under Washington law, in order to establish a claim for tortious interference,
14 Plaintiffs must produce evidence sufficient to support findings (1) of a valid
15 contractual relationship or business expectancy; (2) that Defendant knew of and
16 intentionally interfered with that relationship or expectancy; (3) that the
17 interference induced or caused a breach or termination of that relationship or
18 expectancy; (4) that the interference was for an improper purpose or used improper
19 means; and (5) resultant damage. *Leingang v. Pierce County Med. Bureau, Inc.*,
20 131 Wash. 2d 133, 157 (1997). Plaintiffs also must show that Defendant pursued
21 an improper objective of harming the Plaintiffs or used wrongful means that, in
22 fact, caused injury to Plaintiffs' contractual or business relationships. *Pleas v. City*
23 *of Seattle*, 112 Wash. 2d 794, 803-04 (1989). The existence of an enforceable
24 contract or the breach of one is not required to support an action for tortious
25 interference with a business relationship. *Commodore v. University Mech.*
26 *Contractors, Inc.*, 120 Wash. 2d 120, 138 (1992). Plaintiffs must show that the
27 future opportunities and profits are a reasonable expectation and not based on
28 merely wishful thinking. *Sea-Pac Co., Inc. v. United Food & Commercial*

1 *Workers Local 44*, 103 Wash. 2d 800, 805 (1985).

2 In order for Plaintiffs to succeed in their tortious interference claim, at the
3 minimum, Plaintiffs must show that they had a reasonable expectation of receiving
4 the bid. As discussed above, Plaintiffs have not established any genuine issues of
5 material facts regarding whether Plaintiffs had a reasonable expectation to receive
6 the bid, either as a prime contractor without Defendant as a subcontractor, as a
7 prime or subcontractor with some other company, or as a subcontractor with
8 Defendant as prime. Plaintiffs' claim that they would have received the bid if the
9 parties had submitted a joint proposal with Plaintiffs as prime contractor and
10 Defendant as subcontractor is subsumed within the breach of contract and is not a
11 separate claim. As a result, summary judgment with regard to Plaintiffs' tortious
12 interference claim is appropriate.

13 **D. Defendant's Motion for Summary Judgment Regarding Fraud**

14 Defendant argues that there are no genuine issues of material fact regarding
15 whether it committed fraud against Plaintiffs. Plaintiffs assert that Defendant
16 fraudulently represented to Plaintiffs that it wanted to "team up" with them and
17 that Defendant never intended to "team up" with Plaintiffs, but only made those
18 representations in order to obtain Plaintiffs' proprietary information.

19 Under Washington law, in order to prevail on their fraud claim, Plaintiffs
20 must prove the following elements by clear and convincing evidence: (1)
21 representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's
22 knowledge of its falsity; (5) intent of the speaker that it should be acted upon by
23 the plaintiff; (6) plaintiffs' ignorance of its falsity; (7) plaintiffs' reliance on the
24 truth of the representation; (8) plaintiffs' right to rely upon it; and (9) damages
25 suffered by the plaintiff. *Stiley v. Block*, 130 Wash. 2d 486, 505 (1996).

26 At the hearing, Plaintiffs referred to Exhibit 49, which the Court dubbed the
27 "we prime" email. Plaintiffs did not refer to this Exhibit in their response to
28 Defendant's motions, other than to list the exhibit in their Statements of Facts.

1 There was no discussion of the contents of the document. On the day of the
2 hearing, Plaintiffs presented to the Court a document titled Issues and Evidence
3 Demonstrating Genuinely Disputed Material Facts Precluding Summary Judgment.
4 It does not appear that this particular document was electronically filed. In that
5 document, Plaintiffs refer to Exhibit 49 as evidence of pretext for Defendant's
6 termination of the oral teaming agreement. Pursuant to LR 56.1(b), Plaintiffs were
7 required to set forth the specific facts that they maintain establish genuine issues of
8 material fact. By waiting until the hearing to rely on the email as proof of fraud,
9 Plaintiffs prevented Defendant from replying with evidence surrounding the email,
10 such who was the sender, the responsibilities of this person, and the context in
11 which it was sent. Accordingly, the Court will not consider the evidence of the
12 email due to Plaintiffs' failure to present it in their responsive pleadings.
13 Additionally, during the Fed. R. Civ. P. 30(b)(6) deposition, Plaintiffs admitted that
14 they could not point to any specific evidence of fraud.²

15 Moreover, there is evidence in the record that it was the intention of
16 Defendant's employees, who were based in Richland at the time the parties began
17 working together, to see the project through to completion. Plaintiffs have not
18 introduced any evidence to rebut this conclusion. Accordingly, there are no
19 genuine issues of material fact regarding whether Defendant committed fraud
20 against Plaintiffs, and summary judgment is appropriate.

21 _____
22 ²Pursuant to Fed. R. Civ. P. 30(b)(6), Brett Estey was designated as a
23 representative to testify on behalf of Apollo Sheet Metal and Apollo, Inc. regarding
24 liability. In his deposition, Mr. Estey was asked whether Apollo possessed any
25 facts or information that would lead it to believe or allege that at the time the
26 parties met and verbally agreed to a Teaming Agreement, as Plaintiffs allege, that,
27 in fact, Defendant never intended to actually submit a bid with Plaintiffs and he
28 answered that "there were no facts." (Ct. Rec. 204, Ex. 12.)

**E. Defendant's Motion for Summary Judgment Regarding
Misappropriation of Trade Secrets**

Defendant asserts that there are no genuine issues of material fact regarding whether it misappropriated Plaintiffs' trade secrets. Plaintiffs assert that Defendant misappropriated their trade secrets and used improper means to acquire knowledge of them, and the improper means would be fraudulently entering into the Teaming Agreement with Plaintiff.

Washington statute prohibits the misappropriation of trade secrets. Wash. Rev. Code § 19.108 *et seq.* In order to establish a claim of misappropriation of trade secrets, Plaintiffs first must demonstrate that a legally-protectable trade secret exists. *Boeing Co. v. Sierracin Corp.*, 108 Wash. 2d 38, 49 (1987). Washington statute defines both misappropriation and trade secret. A "trade secret" means information that "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Wash. Rev. Code § 19.108.010(4). "Misappropriation" is defined, in part, as acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means. Wash. Rev. Code § 19.108.010(2).

Defendant argues that Plaintiffs have asserted that only one of Defendant's bid documents contains Plaintiffs' asserted trade secrets and that Plaintiffs' claim for misappropriation of trade secrets fails because Plaintiffs made no reasonable effort to maintain the confidentiality and secrecy of such information. According to Defendant, Mr. Suter, of the TET team, observed no material similarities in the

1 information and data contained in the two proposals to support Plaintiffs' claims.³

2 According to Plaintiffs, Defendant misappropriated from Plaintiffs the
3 following trade secrets: (1) Plaintiffs' knowledge, information, technique, process
4 of method for responding to the task order work RFPs for commercial fabrication
5 services; and (2) the draft proposal prepared by the Apollo/Parsons team pursuant
6 to the teaming agreement. According to Plaintiffs, Defendant did not know how to
7 prepare a technical and management approach to a task order RFP in connection
8 with Hanford work, and Plaintiffs' personnel shared their knowledge and forms of
9 drafts of their approach with Defendant.

10 From the record, it appears that the task order work portion of the RFP was
11 not considered in making the final awarding of the bid. Moreover, Plaintiffs did
12 not provide the Court with any evidence that Defendant's final proposal was
13 similar to the draft proposal prepared by the Apollo/Parsons team. From the
14 Court's perspective, the evidence necessary to support this claim would be a copy
15 of the draft proposal completed up to the time that Defendant terminated their
16 participation in the joint project, and a comparison between the draft proposal and
17 Defendant's final submission. Plaintiffs did not provide this comparison to the
18 Court and without it, there is nothing in the record to support Plaintiffs' claim that
19 Defendant misappropriated their trade secrets. Thus, regardless of Mr. Suter's
20 testimony, there are no genuine issues of material fact regarding misappropriation
21 of trade secrets, and the Court grants summary judgment with regard to Plaintiffs'
22 claim for misappropriation of trade secrets.

23 Accordingly, **IT IS HEREBY ORDERED:**

24 1. Defendant's Motion for Summary Judgment Regarding Damages and
25 Causation (Ct. Rec. 136) is **GRANTED in part, and DENIED in part.**

26
27 ³As discussed above, Plaintiffs have established that a genuine issue of
28 material fact exists regarding the credibility of Mr. Suter's statement.

**ORDER DENYING, IN PART, AND GRANTING, IN PART,
DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT ~ 18**

2. Defendant's Motion for Summary Judgment Regarding Breach of Contract (Ct. Rec. 138) is **DENIED**.

3. Defendant's Motion for Summary Judgment Regarding Tortious Interference with Business Expectancies (Ct. Rec. 140) is **GRANTED**.

4. Defendant's Motion for Summary Judgment Regarding Fraud (Ct. Rec. 142) is **GRANTED**.

5. Defendant's Motion for Summary Judgment Regarding Misappropriation of Trade Secrets (Ct. Rec. 144) is **GRANTED**.

6. The pretrial conference set for June 9, 2005 is **stricken**. The pending pretrial motions will be decided at trial.

7. The Agreed Motion to Shorten Time for Hearing of Apollo's Motion to Modify Scheduling Order (Ct. Rec. 128) is **DENIED**, as moot.

8. Plaintiffs' Motion to Strike Reply Memo (Ct. Rec. 234) is **DENIED**, as moot.

9. The parties' Stipulated Motion to Expedite Hearing (Ct. Rec. 236) is **DENIED**, as moot.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and to furnish copies to counsel.

DATED this 15th day of June 2005.

s/ ROBERT H. WHALEY
United States District Judge

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